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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Steve Keefe, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

FINDINGS OF FACT,
CONCLUSIONS AND
ORDER

vs.

CECO Corporation,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Howard L. Kaibel, Jr., on September 30, 1986 in Minneapolis, Minnesota. The record closed on January 28, 1987, upon receipt of a stipulation of facts related to remedial experimentation.

Louis Hoffman, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Complainant, the Occupational Safety and Health Review Division of the Minnesota Department of Labor and Industry. Roland E. Person, Staff Counsel, CECO Corporation, 1400 Kensington Road, Oak Brook, Illinois 60521, appeared on behalf of Respondent.

Notice is hereby given, pursuant to Minn. Stat. 182.664, subd. 5, that the Findings of Fact and Order of the Administrative Law Judge may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee or their authorized representatives within 30 days following the publication of said Findings and Order. The procedures for appeal are set out at Minn. Rule 5215.5000.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are (1) whether Respondent violated 29 C.F.R. 1926.451(g)(5) and/or .105(a) and/or .28(a) - by allowing employees to be exposed to a fall which might produce death or serious injury; and (2) if so, whether under the circumstances, the conduct is subject to the affirmative defense of "impossibility" or "infeasibility".

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I On April 30, 1986, an Occupational Safety and Health inspection was conducted by an Occupational Safety and Health investigator of the Minnesota Department of Labor and Industry, at Respondent's worksite at 330 South Seventh Street, a 31-story office building under construction in Minneapolis. This was a routine inspection, not pursuant to any complaint, the second such routine inspection since Respondent commenced work on the site.

2. Respondent was engaged in moving concrete forms and other equipment from the fourth floor where it had just completed laying the concrete flooring to the fifth floor. The lifting was done by an overhead crane whose operator could not observe the operation and had to rely on radio communication instructions.

3. In order for the crane to drag the equipment off the lower floor and swing it up onto the upper floor, a portion of the outermost guardrail around the edge of each floor had to be removed.

4. This exposed employees engaged in assembling the equipment for transportation and attaching it and guiding the crane, to the danger of a fall through the unguarded openings.

5. In an attempt to minimize this danger, Respondent developed and constructed an "outrigger scaffolding" which is a moveable platform that attaches to and extends out from the side of the building. This outrigger has 4-foot, 6-inch guardrails, which exceeds regulatory standards, on all three non-building sides to protect the employees assembling the equipment and attaching the crane.

6. The outermost center guardrail of this three-sided outrigger is hinged on the bottom so that it can be lowered outward to become an extended floor, once the crane is attached to the load or whenever the load to be transported is longer than the outrigger platform. Earlier models of the outrigger used

by the industry had outermost guardrails which were not hinged. They had to be abandoned in favor of the new design because the materials being hoisted repeatedly smashed or became lodged in the outermost guardrail, tilting the platform.

7. The area between the top and bottom of this outermost guardrail consists of a net of "Tensar", a rigid polyethylene mesh with the strength of steel, exceeding OSHA specifications. (A sample of the material is included in the record as Exhibit 14 and a description as Exhibit 13). This netting was designed to provide fall protection when an employee is forced to work on the platform while the outermost guardrail is in the lowered position.

8. Respondent specializes in concrete construction of tall buildings in Minnesota and throughout the United States. It utilizes this particular model of the outrigger scaffolding and variations thereof on these construction projects every day.

9. If the Respondent were not using the outrigger, the employees involved in this operation would have been constantly exposed to the danger of falling off the unguarded floor, including leaning out over the edge while they caught the crane cable, pushing materials over the edge and directing the crane

operator. In addition, there would be an increased danger of materials falling on the employees from above because of the increased "swing" and the required accuracy of the crane needed to move materials -from one floor to another without the outrigger extension.

10. Since Respondent began using the outrigger to improve employee safety, it has attempted to make improvements in subsequent models of the device. The earliest models had no guardrails at all. The model used on this job site was the most advanced Respondent was using anywhere in the country. There was no evidence in this record of any superior design being utilized anywhere else in the United States by this or any other employer.

11. The latest outrigger design involved in this proceeding leaves a gap which it would be possible for an employee to fall through when the outermost guardrail is lowered, on both sides, between it and the upright side guardrails. The only thing preventing a fall off of these corners is a rope connecting the top of the side guardrails to the top of the outermost guardrail.

12. The rope used to lower and raise the outermost hinged guardrail is connected near its center to avoid exposure to these corner gaps. However, for approximately a minute on each trip, one employee stands on the outrigger after the outermost guardrail has been lowered, directing crane operators. During this period, the responsible employee sometimes walks within the proximity of the corner gaps. This employee's attention during these times is often directed towards the transported materials.

13. An employee who was standing within a few feet of one of these corner gaps, sometimes walking backwards, during the inspection, was the reason that the OSHA inspector issued the citation initiating this proceeding.

14. Respondent's employees were instructed in the use of safety procedures, particularly the dangers involved in using the outrigger. There is extensive documentation of these instructions in the record.

15. Respondent's employees were supplied with all necessary safety equipment to prevent accidents, including specifically safety belts and lanyards for use in unguarded fall situations. (Such situations are frequent in such concrete construction operations which often precede structural ability to institute more elaborate safety precautions. Employees exposed to the corner gaps in the outrigger at the time of the inspection were wearing safety belts for attachment to lifelines and an adequate number of such lifelines was provided by the employer.

16. Blueprints submitted for the project established that a lifeline for the employee radioing from the outrigger would have to be at least 70 feet long. It would have substantially interfered with the transport of equipment to the outrigger by the other laborers and forklift trucks. It would also have increased the dangers of entanglement of the lanyard in the materials being transported.

17. Respondent experimented with having the radio operator tie off in the past. In one such case, the tag line got caught in the material being lifted and the employee was almost dragged off the outrigger.

18. The OSHA investigator believes that outrigger safety could be improved and standards complied with by adding some kind of collapsible netting between the side guardrails and the outermost guardrail to eliminate the corner gaps when the outermost guardrail is lowered.

Respondents believe that such netting would get snagged in or foul up loads of materials being transported, but admit that they had never experimented with this recommended modification. Complainant did not submit any evidence indicating that such netting has ever been used successfully elsewhere on any similar outrigger.

19. The corner gaps could also be eliminated by extending the side guardrails 4-1/2 feet, so that there would be no corner gaps when the outermost guardrail is lowered. Respondents were concerned that this would add weight and wind resistance at the point farthest from attachment of the outrigger to the building, where any such additional stress would be the most dangerous. The outrigger is attached to and solely supported by the recently poured concrete floor. Concrete requires 28 days of curing to reach its maximum structural strength. Respondent was working on a 6-day cycle, so that the concrete that the outrigger was attached to had as little as 50% of its maximum support capability. Respondent's engineers had to take this into consideration in designing dimensions and weight for any proposed changes. Neither the Respondent nor Complainant had commissioned an engineering study to evaluate the merits of this possible modification.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. That the Minnesota Occupational Safety and Health Review Board and the Administrative Law Judge have jurisdiction herein and authority to take the action proposed pursuant to Minn. Stat. 182.661, subd. 3, 182.664, and 14.50.

2. That the Board gave proper notice of this hearing and that the Complainant and the Board have fulfilled all relevant substantive and procedural requirements of law and rule.

3. That the Respondent is an employer as defined by Minn. Stat. 182.651, subd. 7.

4. That the employees involved at this worksite were employees as defined in Minn. Stat. 182.651, subd. 9.

5. That Complainant has the burden of proving the validity of the citation by a preponderance of the evidence.

6. That Complainant has not met that burden, as explained in the attached memorandum.

7. That "infeasibility" is an affirmative defense to the citation. Respondent need not prove "impossibility." When the Respondent argues infeasibility, Complainant has the burden of proving alternatives. He did not meet that burden in this case.

8. That the burden of proof is on Complainant to demonstrate by a preponderance of the evidence that there is an alternative feasible means of avoiding the hazard.

9. That Complainant has not met that burden, as explained in the attached memorandum.

10. That the evidence relating to subsequent remedial measures is not admissible in response to the affirmative defense of feasibility, as explained in the attached memorandum.

11. That this same evidence should not be entertained in this case because the potential for prejudice involved would outweigh its probative value.

12. That Complainant has not proven by a preponderance of the evidence that Respondent violated 29 C.F.R. 1926.105(a) which provides that:

Safety nets shall be provided when work places are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

13. That Complainant has not proven by a preponderance of the evidence that the Respondent violated 29 C.F.R. 1926.451(g)(5) which provides that:

Guardrails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection), approximately 43 inches high, with a mid-rail of 1 x 6 inch lumber (or other material providing equivalent protection), and toe boards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

14. That Complainant did not prove by a preponderance of the evidence, that Respondent violated 29 C.F.R. 1926.28(a) which provides generally that:

The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for such equipment to reduce the hazards to the employees.

15. That Complainant did not prove by -a preponderance (I the evidence that there was a feasible means of complying with 29 C.F.R. 1926.28(a) which is a general standard that does not specify a particular method of compliance.

16. That the "net" standard in 29 C.F.R. 1926.105(a) and the "scaffolding" standard in 29 C.F.R. 1926.451(g)(5) are specific standards which prevail over the "protective equipment" standard in 29 C.F.R. 1926.28(a), when the specific standards are applicable to the same operation, pursuant to 29 C.F.R. 1910.5(c)(1).

17 . That there was no allegation in this proceeding of a violation of the general duty clause.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED: that the citation be and the same is hereby DISMISSED.

Dated: February 1987.

HOWARD L. KAIBEL, JR,
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. I , the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped.

MEMORANDUM

Background.

The basic facts in this citation are adequately addressed in the attached Order. They will not be reiterated here. There is no doubt that employees were exposed to a risk of serious injury or death. The only legal questions involve whether this exposure violated the law.

Complainant's burden of proof includes:

- (1) The application of the cited standard;
- (2) The existence of non-complying conditions;
- (3) Employee exposure or access;
- (4) Employer knew or with the exercise of reasonable diligence could have known, of the violative condition.

Belger Cartage Service, Inc. , 79 OSAHRC 16/84, 7 BNA OSHC 1233, 1235 (No.

76-1480, 1979); Harvey Workover, Inc - , 79 OSHRC 72/D5, 7 BNA
OSHC 1687
1688-90, 1979 CCH OSHO 23,830, pp. 28,908-10 (No. 76-1408, 1979);
and Anning
Johnson Co. , 76 OSAHRC 54/A2, BNA OSHC 1193, 1975-76, CCH OSHD
20, 690 (Nos.
3694 and 4409, 1976).

"Reasonable Persons" and Industry Standards.

The first (I) and last of these requirements (4) have not been proven by the Complainant by a preponderance of the evidence. The proof required with regard to employer knowledge is twofold. First, it must be proven that the employer knew of the "condition" or circumstances of the exposure of the employee to the hazard. This is usually imputed to the employer and was not an issue in this case, because the employer does not dispute that it knew precisely what the employees were doing at the time of the citation. Secondly, it must be proven that the employer knew or had reason to know that the condition was "violative". That is the shortcoming here.

Respondent here proceeded in good faith and with prudence. It has created and improved equipment and procedures for carrying out this transport operation in a way that has markedly improved the safety of its employees. It has done so under the watchful eye of OSHA inspectors throughout, including a previous inspection of the same equipment on this site, and many others over the years, in Minnesota and throughout the country. There is no evidence in this record that Respondent had any actual notice or knowledge that its actions could be construed as violations of the law and there is no evidence which would support a conclusion that "constructive" or "implied" knowledge should be imputed to the employer in this record. There is no evidence that any OSHA inspector anywhere has ever previously so much as suggested that Respondent should experiment with any of the alternatives for improving the outrigger scaffolding, advocated by the investigator after his citation in this proceeding (such as installing nets or extending the side guardrails or use of a "static" tagline or a much larger platform). In short, Complainant has not established by a preponderance of the evidence that Respondent's conduct was culpable, requiring affirmation of the citation for a violation of the law and assessment of the proposed penalty of \$472.

The 5th Circuit Court of Appeals enunciated the basic legal knowledge or notice requirements in *S & H Riggers and Erectors, Inc. v. OSHRC*, 659 F.2d 1273 (1981) at 1282:

[D]ue process requires not only that employers be aware of a hazard but also that they have notice of what is required of them under the regulations in response to that hazard. (Emphasis added).

The Court stressed the importance of applying the "general industry practice" standard. The Court reversed an attempt to penalize an employer who believed he was following practices -that were generally considered safe in the industry. Although the decision reversed a Commission decision, it is doubtful that the Commission and the Courts in that Circuit are really very far apart. In the federal commission decision reversed by the court in that case (7 OSHC 1260, 1979 OSHD 23,480) the Commission conceded that "industry custom and practice are useful points of reference" but said "they are not controlling", indicating compliance under OSHA might require methods beyond industry practice.

On the one hand, it is clear that the Commission never meant that the Secretary should penalize an employer following an industry practice if the precautions were those that a "conscientious safety expert seeking to prevent

a 1 1 hazards " fami 1 Iar with the Indus try would take. This is the version of the general industry practices test adopted by the 1st Circuit in General Dynamics Corp. v. OSHRC, 599 F.2d 453 (1979) at 464-65 and n. 8. -It is certainly doubtful that the Commission meant its decision to be interpreted as imposing sanctions on employers following prudent general industry practices where there was no notice of the government's requiring more stringent precautions. The Commission doubtless agrees that OSHA penalties must be fault-based and that employers must to given reasonable notice of required improvements in standard industry methods and time and due process in achieving compliance.

On the other hand, it is likewise clear In subsequent decisions that the 5th Circuit never intended its decision in S & H Riggers to be interpreted as allowing employers to continue following existing industry custom and practice forever, prohibiting the government from mandating feasible safety improvements. The Court only required "due process" and "notice of what is required".

Adequacy of notice or knowledge where employers are following accepted industry practices is a tough question which has been repeatedly litigated. "Accepted industry practices" could be below par safety-wise. For example, standard industry practices were found to be inadequate when they produced a record of repeated significant injuries in the package handling industry that could have been avoided by requiring employees to wear steel-toed shoes. When the industry practice is below par, it is OSHA's responsibility to adopt stricter practical standards sufficient to protect employees and to put employers on notice that their "standard" practices must be upgraded. Once employers have adequate legal knowledge of their government's stricter standards (and perhaps an opportunity to obtain judicial review prior to enforcement); then and only then, the employers may be penalized.

This was specifically recognized by the Federal Commission in the S & H Riggers decision which has been adopted by nearly every circuit, at n. 11:

It is a basic principle of due process that laws must provide reasonable and intelligible standards to guide the conduct of affected individuals and to prevent arbitrary and discriminatory enforcement by those who apply them.

In order to satisfy this due process requirement, laws must be sufficiently clear to give persons of ordinary intelligence a reasonable opportunity to know what is prohibited or demanded so that he or she may act accordingly. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The "reasonable person" test meets this due process requirement.

The 5th Circuit decision reversing the Commission in S & H Riggers, in refusing to assess a penalty, indicates at 1275:

At least, in the absence of a clear articulation by the Occupational 'Safety and Health Review Commission of the circumstances in which industry practice is not controlling, due process requires a showing that the employer either failed to provide personal protective equipment customarily required in its industry or had

equipment actual _knowledge that personal protective
 was
 required under the circumstances (of the
case. (Emphasis
 added).

On the same day as it handed down its decision in S I, H Riggers the same court also handed down another OSHA decision in Owens-Corning Fiberglass Corp. v. Donovan, 659 F.2d 1285 (5th.Cir. 1981), affirming a fiberglass industry citation for failure to require wearing of gloves. It rejected the respondent's content i on tha t i t " had no actual knowledge that the use of the gloves is or should be mandatory". It premised this rejection on a 30-year injury record and persistent requests of employees for the safety equipment.

The court in S & H Riggers specifically cites, with approval , an 8th Circuit decision six years earlier in Brennan v. OSHRC, 513 F.2d 713 (1975). The Brennan decision coincidentally involved the same "net standard" allegedly "and/or violated in this proceeding, 29 C.F.R. 1926.105(a). The decision confirms a Federal Review Commission interpretation of the standard indicating that it cannot be applied to employees on scaffolds, according to the unambiguous language that nets are only required when employees are not using scaffolds. The court in the Brennan decision closed its opinion by inviting OSHA to amend or clarify the regulation if it wishes to achieve a different interpretation. it's been 11 years and the regulation has not been revised.

The Brennan court specifically refused to impose civil penalties on an employer where, "to do so would subject him to liability without warning." In short, the requirement of an adequate warning (or notice or knowledge) in OSHA enforcement cases has been around in this circuit for more than a decade.

The test applied by the Federal Review Commission and most modern Circuit decisions as to adequacy of notice is the "reasonable person" test.

The leading case in this area is Cape and Vineyard Division v OSHRC, 512

F.2d 1148 (1st.Cir. 1975) at 1152:

An appropriate test is whether a reasonably prudent man familiar with the circumstances of the industry would have protected against the hazard. [citations omitted]. We would expect, most often, that reference to industry custom and practice will establish the standard of conduct.

That standard was adopted by the 5th Circuit in 1979 in *Cotter and Co. v. OSHRC*, 598 F.2d 911 which held that the crucial question was not whether the employer knew that employees' were not wearing steel toed shoes. Rather, considering established industry practice, the test is whether Complainant introduced sufficient "evidence in the record of a specific, confirmed knowledge" that the accepted practice was illegal.

The test was also adopted the same year by the Fourth Circuit in *Bristol Steel and Iron Works, Inc. v. OSHRC*, 1979 OSHD It 23,651. In a very similar case to this one, employees rigging a float scaffold were cited for wearing but not using safety belts and lanyards, under the same standard cited

herein:

Since there was nothing in the record to demonstrate that a reasonably prudent employer familiar with steel erection would have protected against the hazard of falling by the means specified in the citation, the Commission's finding of a violation of the 1926.28(a) general safety standard was not supported by substantial evidence.

The "reasonable man familiar with conditions in the industry" test was also adopted by the Second Circuit in 1978. American Airlines, Inc. v. Secretary of Labor, 578 F.2d 38 at 41. The Ninth Circuit specifically adopted the same knowledge test in a similar case involving whether an employer should be cited for not requiring the wearing of protective gloves in the sausage manufacturing industry in 1976. Brennan v. Smoke-Craft, Inc., 530 F.2d 843 at 845.

The Eighth Circuit first adopted the Cape and Vinyard rationale in 1976 in a protective footwear case explicitly using the "reasonable person" test to determine when an employer has sufficient knowledge to be culpable. Arkansas-Best Freight Systems, Inc. v. OSHRC, 529 F.2d 649 at 655.

A very similar fact situation to that involved herein was resolved by the courts in B and B Insulation, Inc. v. OSHRC, 583 F.2d 1364 (5th-Cir. 1979). That case involved interpretation of the same 1926 C.F.R. 28(a) OSHA standard relating to fall protection for a building construction worker who was not tied off while insulating pipes. Only one of the 11 witnesses testifying at the hearing believed that the employer should have known that failure to use lanyards violated OSHA requirements - the OSHA compliance officer. The officer had never before issued a similar citation to this or any other employer, -although the employer was investigated regularly. The employer had been working in the same fashion at this and many other sites but was never

cited for not using safety belts. The employer forthrightly stipulated that a fall was possible under the circumstances and that it could result in serious injuries or death. The employer was following what was believed to be universal industry practice and had no reason to believe that such practice would be interpreted by OSHA inspectors as violating longstanding OSHA standards. The kind of construction operation in that case also involved an early stage in the building construction process, prior to erection of more elaborate safety measures. The employer did not contest a separate citation for working too close to energized electric lines. There was no doubt that the employer knew employees were not tied off under the circumstances. The only question was whether the employer knew or should have known, based on following standard industry practice, that this would be construed to be an OSHA violation. The court dismissed the citation, indicating at 1370:

In other words, the Commission would assert the authority to decide what a reasonably prudent employer would do under particular circumstances, even though in an industry of multiple employers, not one of them would have followed that course of action.

All of these "reasonable person familiar with the industry" court cases predate the Federal Review Commission decision in *S & H Riggers* above which specifically incorporates the 'reasonable person test' as the appropriate

standard for deciding whether employers knew or should have known that their conduct violated the statute. (See note 11, quoted above).

None of the above-cited cases (nor any others uncovered in research) would limit the requirement (of due-process-notice-proof to "general" versus "specific" standards. Indeed, the 8th Circuit Brennan decision discussed above involving similar facts that were cited in S & H Riggers interpreted and applied the 105(a) "net" standard which all would unquestionably classify as a "specific" standard. S & H Riggers and several of the other cases discussed above involved the 28(a) protective equipment standard which arguably could be distinguished as being "general" versus "specific."

The attached order concludes that the protective equipment standard is more general than the scaffold standard, so that the scaffold standard controls and the protective equipment standard is inapplicable, as discussed below.

However, the attached order does not conclude that the protective equipment language is a "general" versus "specific" standard in any other legal sense. Learned Federal Appellate Circuit Justices differ over the applicability of such classifications in relation to 28(a). The S & H Riggers decision, for example, criticizes the "somewhat remarkable view" of the 2nd Circuit that 28(a) is a "specific" standard. (note 8 at 1279). This question was not argued on this record and a legal conclusion is neither necessary nor appropriate under the circumstances.

No such conclusions are necessary with regard to the "protective equipment" 28(a) standard, because it is superceded by the more specific "net" and "scaffold" standards discussed below. In order to avoid any need for remand, it is noted that the order however, specifically further assumes that the "due process-industry custom notice" rights of employers apply to all standards -- "general" co "specific", regardless of classification (although

the burden of proof of notice required is obviously decreased as the specificity of standards increases). Of course, if a standard is specific enough (e.g., "The air shall not contain more than X P.P.M. of Y or Z" or "outriggers shall contain at least X square feet and hinged guardrails are prohibited) employers are held to know the law.

If a reviewing authority decides that the 28(a) standard should be "and/or" applied because it is not more general and/or because employers are not entitled to advance knowledge of potential violations, the result would be the same because of the lack of proof of applicability of the standards. This is discussed in the next section of this memorandum.

Employer knowledge or notice as a defense has carefully supervised limits in this and other jurisdictions. A federal Administrative Law Judge ruled, for example, in 1980, in Steel Constructors, Inc., 8 OSHC 2146, 1980 OSHD 24,788 that the Secretary did not show that the employer knew or should have known of a superior method of boom disassembly. The method used was held to be "recognized within the steel erection industry as the proper and safe method." In contrast, the same respondent was fined severely by another Administrative Law Judge in another case decided the same year involving different aspects of the job, because "the employer was well aware of the requirements of the standard through prior citations." Steel Construction, Inc., 1980 OSHD 24,612.

There was no evidence in the record in our case that Respondent CECO was previously cited or otherwise put on notice that an OSHA inspector might interpret its outrigger safety measures as a violation of standards. There was also no other evidence of any other kind that would put a reasonable employer on notice that such industry recognized safety measures were deficient, such as a record of past accidents in using the outrigger. See, *Usery v. Marquette Mfg. Co.*, 568 F.2d 902 (2nd.Cir. 1977).

Experience with or demonstrable knowledge of past accidents has repeatedly been held to be constructive employer knowledge for a reasonable person. See, for example, *Ryder Truck Lines, Inc. vs. Brennan*, 497 F.2d 230 at 233 (5th.Cir. 1974), where the history of past injuries should have put a reasonable person on notice and *McLean Trucking Co. v. OSHRC*, 503 F.2d 8 at 10-11 (4th.Cir. 1974), where there was inadequate evidence in the record of past industry practices. The Eighth Circuit court in the *Arkansas-Best* case, cited previously, concluded that a record of roughly 20 injuries a year in each of the last 4 years was adequate to put the employer on notice that it should begin to provide steel-toed shoes to cargo handlers.

In addition to prior accidents and citations, reasonable employers have reportedly been held to possess constructive knowledge that their safety practices may violate OSHA requirements when there were at least .3 written complaints prior to the inspection, where there were inadequate safety inspections and instructions and where safety rules were not enforced. (Rothstein, *Occupational Safety and Health Law*, 2nd. Ed., West Handbook Series, pp. 111-112). 'There is no evidence here that the employer has ever received even one written or oral complaint from an employee about the safety of its outriggers. There was also no evidence of inadequate safety rules, instructions, or internal inspections.

In the case involved in the attached Order, the burden of proving that a

conscientious reasonable employer familiar with practices in the industry would have known the safety practices were illegal was on Complainant. That burden was not fulfilled.

Safety Equipment.

The - and/or .- and/or form of the citation could potentially lead to misapplication of the standards. !-he netting and scaffold standards are more specific than the protective equipment standard, in that they specify a particular method of compliance. The personal protective equipment provision is a more general standard, which does not specify a particular method of compliance. 29 C.F.R. 1910.5(c)(1) provides that a specific standard shall prevail over a different general standard when both are applicable to the same operation. It follows that "appropriate" personal protective equipment is required where the employer does not provide netting or scaffolding that meets the standards.

As noted above, the netting standard has been repeatedly construed by courts in this circuit and others as not being applicable according to its unambiguous terms "where the use of ... scaffolds, ... is impractical." Here the use of a scaffold was practical. The outrigger scaffold was specifically engineered and constructed by the employer as a safety measure for employees who had to direct overhead cranes in lieu of having to lean out over

unprotected edges that could have been protected with 8-foot netting.

Moreover, the standard provides that nets are only required "where the use of . . . catch platforms, . . . is impractical." Here, the hinged guardrail in its lowered position on the scaffold, served as a catch platform. The catch platform and scaffold have been used regularly as an alternative to netting in this industry with the repeated approval of the courts and OSHA enforcement personnel for years. The netting standard simply does not apply.

The scaffold standard does apply. That is the standard that the employer has elected to comply with. There is no question that the scaffold utilized when the outside guardrail is in the upper position, exceeds the requirements of the spec4c standard relating to scaffolding. The outer guardrail must be hinged and lowered to a catch platform function to accommodate some of the longer materials being transported.

The attached Order concludes that the employer has complied with the specific scaffold standard which prevails over the more general "protective equipment" standard. However, (in order to avoid potential reversal) the Order further concludes that Complainant has not met the burden of proving a violation of the protective equipment standard or of proving the feasibility of some other particular mode of compliance.

The more general standard allegedly "and/or" violated here is 1926.28(a)
- personal protective equipment:

The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions and where this part indicates the need for using such equipment to reduce the hazards to the employees. (Emphasis added).

The burden of proof to establish violation of this standard and the feasibility of compliance is on the Complainant (Dunbar cited below at p. 36,028 and note 18). Respondent's employees using the outrigger wore safety belts. There is no dispute as to whether there were adequate lanyards to use

with those belts or as to whether the employees received adequate safety instruction in their use. The only other evidence as to whether use should have been required by the employer is a floor plan submitted by the Respondent, showing that the lifeline would have to stretch 70 feet across the main area of operations of the laborer's lift trucks and materials being transported; plus past experience of increased hazards to employees attempting to use lifelines while directing cranes by radio. It is agreed that employees cannot tie-off to the outrigger because of the danger that the outrigger might dislodge and carry the attached workers to death or serious injury. Respondents also presented witnesses with extensive experience in this area who indicated that it is standard practice in the industry to direct the cranes from the outriggers without tying off and that the employees involved desired to continue that practice, with full knowledge of the potential dangers of falling and also knowledge of the dangers of lanyards being snagged if employees tied off.

Complainant, on the other hand, has provided little more than the testimony of an investigator (who seemed particularly competent, thoughtful and fair) with very little experience in such concrete construction ("many years ago") indicating that tying off is one recognized way of generally

mitigating hazards of falling. This does not meet the burden of proving by a preponderance of the evidence that the employer violated its legal duty under the statute.

impossibility or Infeasibility.

Decision of this case on the above grounds means that it is unnecessary to reach the question of whether the affirmative defense of "impossibility" versus "infeasibility" applies in this proceeding. However, the Office of Administrative Hearings customarily decides all significant issues argued by the parties to avoid any need for remand.

This issue dominated the briefs of the parties and is an important question that will have to be eventually answered. If the attached Order is at some point reversed on the above grounds, by the Review Board or reviewing courts, it would be very helpful if the reversing authority would also address the question of which standard to apply.

Until recently, Minnesota and Federal Review Commission decisions drew a sharp distinction between infeasibility and impossibility, holding that in order to prevail, an employer must prove that compliance with the applicable standards was "impossible". This affirmative defense was seldom pleaded successfully because "nothing is impossible." Moreover, these Review Board and Commission decisions placed the burden of proof on the respondent-employer to disprove the viability of any and all suggested methods of compliance.

In this case, Respondent did not prove by a preponderance of the evidence that compliance was infeasible, nor did Complainant prove feasibility. The burden of proof on this question is consequently important.

In July of this year the Federal Commission explicitly reversed its position on this question, in a decision which is potentially very significant for occupational health and safety in Minnesota and throughout the country, Secretary of Labor v. Dun-Par Engineered Form Company, OSHRC Docket No.

79-2553, 27,650 (Westlaw, July 30, 1986). This case coincidentally involved protection for a somewhat different aspect of fall concrete construction. It held that employees on an 11-story building. henceforth employers need only prove that compliance with the Act was infeasible, rather than impossible. It further reallocated the burden of proof to the complainant to establish by a preponderance of the evidence that there is some feasible or practical alternative way that the employer could have used to comply. The decision gave the Secretary of Labor 20 days to review the matter and seek remand to prove feasibility. No such remand request was submitted and the Dun-Par decision became a final Order in September (C.C.H. Employment Safety and Health Guide, No. 801, September 17, 1986, 27,674).

The Federal Review Commission decision suggests that the law in this jurisdiction may have already eroded the absolute nature of the impossibility defense. It quotes at length from an 8th. Circuit decision in 1980, H.S. Holtze Construction Company v. Marshall., 627 F.2d. That case also coincidentally involved unavoidable temporary removal of guardrails in the early stages of construction, where lifelines would have to be 70 feet long.

While we are mindful of the -broad scope and remedial purposes of the Occupational Safety and Health Review Act,

we are of the opinion that some modicum of reasonableness and common sense is implied. There is a point at which the impracticality of the requirement voids its effectiveness and that point has been reached when to erect an entge wall, a project said to take approximately two hours, petitioner must begin an endless spiral of tasks consisting of abatement activities which necessitate further protective devices, i.e., guardrail to erect wall, scaffold to erect guardrail, safety devices to erect scaffold, etc. We agree with the dissent that some demarcation line must be drawn between that which is genuinely aimed at the promotion of safety and health and that which, while directed at such aims, is so imprudent as to be unreasonable. (Holtze at 151-52).

It remains to be seen whether the Minnesota Review Board and/or courts in this jurisdiction will apply the Dun-Par decision in Minnesota cases where the defense of infeasibility is raised. The Federal Review Commission decision is technically not binding precedent, however, the Minnesota Board and courts have generally followed such precedents in the past. Uniformity of interpretation of the Act is important to major national employers, such as the Respondent involved in this proceeding.

Complainant argues strongly in this case that the Minnesota Review Board and state and federal courts should reject the Dun-Par precedent. Resolution of this aspect of the legal dispute involves important policy judgments that will have longlasting impact on interpretation of the Minnesota OSHA law and the protection it affords Minnesota employees.

Complainant's final brief does not make a convincing case for distinguishing the standard properly applicable in Minnesota OSHA inspections

on outriggers from that applicable in other states or in federal inspections. Respondent uses the same outriggers, employees and safety procedures every day throughout the country. Doubtless, Minnesota has always been a leader in employee safety and most of its citizens would take a dim view of federal dilution of standards. However, the law in this jurisdiction and generally has never required employers to demonstrate that all conceivable alternatives are impossible rather than impractical or infeasible.

From the outset, the law has never mandated that employers provide a "risk free" environment. The Senate insisted when the Act was adopted on inclusion of an amendment by Senator Javits ensuring that the regulations would only ensure safety "to the extent feasible", 29 U.S.C. 655(b)(5). (Emphasis added). That restriction was challenged and upheld in American Textile Manufacturers Institute, Inc. v. Donovan 452 U.S. 490, 101 Sup.Ct. 2478, 69 L.Ed.2d 185 (1981).

A schism developed from the beginning between the OSHA administration and the courts on this question. That difference between the court-enunciated law and enforcement orders of OSHA administrators is well recognized in the literature and need not be reviewed at length in this memorandum.

The Eighth Circuit court has always been a leader in reminding OSHA administrators of the feasibility limitation. In the Arkansas-Best decision, cited earlier, it noted at 654: "Moreover, the legislative history makes

clear that the standards promulgated by the Secretary must be feasible." (Emphasis added) Two years later in *UPS of Ohio v. OSHRC*, 570 F.2d 806 (8th Cir. 1978), it noted, "Thus, while the statute is to be construed liberally in the interest of employee health and safety, still, the rule to be applied is one of reasonableness and feasibility." (Emphasis added). In that case the court agreed that some employers handling heavy cartons of parcels should be required to wear steel toed shoes, but refused to extend the interpretation of the regulation to employers sorting the smaller parcels. Two years later it issued the Holtze decision, cited earlier, which was quoted at length by the Federal Review Commission in *Dun-Par* this summer when it finally abandoned the insistence on the "impossibility" distinction.

The law on the affirmative defense of feasibility should have been clear since the OSHA statute was first adopted. The courts have been unequivocal in this jurisdiction and most others since the very beginning. It begs the question to ask whether Minnesota should follow the *Dun-Par* decision on the federal level. All courts in this jurisdiction reached the same conclusion at least 10 years prior to the Federal Review Commission decision in *Dun-Par*.

Feasibility of alternatives must be documented by complainant when that matter is contested, by a preponderance of the evidence. It has not been done in this case.

Evidence-Remedial Measures.

Similarly, judicial economy would be served, in the event of potential reversal, if reviewing authorities would supply some direction on an evidentiary question with significant policy ramifications. This question was also briefed by the parties, but need not be reached unless the question of impossibility and/or infeasibility is considered. This is the question of admissibility of testimony relating to subsequent remedial measures.

During direct testimony of the inspector at the beginning of the hearing,

Complainant requested that the Administrative Law Judge inspect the changes made in the outrigger since the time of the inspection that led to the citation. Respondent objected vigorously, citing the arguments and policy reasons that are usually raised against the admissibility of this kind of testimony. Respondent basically argued that such evidence is irrelevant, misleading and contrary to the goal of encouraging safety and experimentation with improvements. In response to these arguments, Complainant withdrew his request. However, the request was renewed later in the hearing when Complainant's counsel decided to "reopen that can of worms" without citation to any legal authority. The testimony was excluded. In his final written brief, Complainant did cite to some legal authority discussed below and requested that the hearing be reconvened to consider testimony on past remedial measures. That authority was persuasive. The parties were asked and agreed to stipulate to the facts relating to subsequent remedial activities so they could be preserved, to avoid any necessity of remand.

The general rule and considerations involved are summarized in a United States Supreme Court case, *Columbia and Puget Sound R. Co. v. Hawthorne*, 144 U.S. 202, 12 S.Ct. 591, 36 L.E.D. 402 (1892):

It is now settled . . . that the evidence is incompetent, because the taking of such precautions against the future

is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant has been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue and to create prejudice against the defendant.

That leading U.S. Supreme Court case in turn quotes with approval a prior Minnesota Supreme Court case, *Morse v. Minneapolis and St. Louis R. Co.*, 30 Minn. 465, 468 (1883). In that case Justice Mitchell, speaking for a unanimous court, wrote:

Every person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem to be unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence.

On the other hand, Complainant in his final brief makes a sound case for admissibility in the event that feasibility becomes a determinative issue. He points out that Minnesota Rule of Evidence 407 requires exclusion of all subsequent remedial measures, but explicitly leaves the discretion to admit such evidence where it is offered to prove the "feasibility of precautionary measures." The brief also cites a Federal Appeals Court decision in the 8th Circuit, *Anderson v. Malloy*, 700 F.2d 1208 (8th Cir. 1983), a rape case where

evidence of a motel installing "peep holes" and chain locks after the rape, was excluded. In that decision, construing identical federal rules of evidence, the case was reversed and remanded for failure to include evidence on remedial measures where feasibility was an issue.

On the surface this would appear to be potentially a close question with important policy implications for future OSHA law enforcement, particularly if the federal infeasibility standard is adopted. A rule permitting admission of evidence on remedial measures would appear to discourage employers from experimenting with improvements whenever they contest citations, to the continuing detriment of the safety of the employees allegedly endangered.

Limited research suggests that modern authorities have tended to allow the exception to swallow the rule. Maine has explicitly adopted a rule of evidence flatly allowing all evidence of remedial measures. Most cases now conclude that the rLOe is not a limitation on discovery, although there is respectable contrary authority. See, *Vander Missen v Kellogg-Citizens National Bank*, 481 F.Supp 742 (E.D.Wisc. 1979). Neither party cited to any OSHA cases dealing with this issue, but limited research suggests that OSHA decisions are also following the trend of modern authority.

In 1976 the Federal Review Commission considered the question in *William Enterprises, Inc.*, 79 OSHARC 24/A2, 1976-77 OSHD 21 071. It held that such evidence should be admissible for the purpose of proving feasibility or

utility of alternatives, citing Boeing Airplane Co. v. Brown, 291 F.2d 310, 315 (9th.Cir. 1961).

A major exception to the rule in modern litigation has been cases involving strict liability in products liability suits. The theory there is that negligence is irrelevant, so evidence of subsequent experimentation cannot prejudice the defendant. Robbins v. Farmers Union GTA, 552 F.2d 788 (8th Cir. S.D. 1977). A major case involving this exception is currently pending before the Minnesota Supreme Court in Robert Kallio v. Ford Motor Company. It was argued this month on February 4, 1987 at a special session of the Court at William Mitchell College of Law.

However, it is well settled that Congress and the Minnesota Legislature never intended that the OSHA law should impose strict liability on faultless employers. The issue in this proceeding is whether the Respondent should be penalized for knowingly violating a recognized standard. That's a matter of fault rather than strict liability.

In such cases, modern authority still recognizes the prejudice involved in admitting hindsight evidence on the question of ordinary care: Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120 (6th.Cir. Ohio 1955), 57 Ohio Ops 391, 71 Ohio L.Abs. 593, 50 ALR 2d 882, Rem.denied (6th.Cir. Ohio) 229 F.2d 434, 50 ALR 2d 897; and Cert.den. 350 U.S.937, 100 L.Ed. 818, 76 S.Ct. 308; Reh.den. 350 U.S. 976, 100 L.Ed. 846, 76 S.Ct. 431; Accord, Cox v. General Electric Co, 302 F.2d 389 (6th.Cir. Mich. 1962). c.f. Faber v. Roelofs, 298.Minn. 16, 212 N.W.2d 856 (1973) and cases cited therein.

The case herein involves what standard of care the Respondent CECO Corp. should have been held to on April 30, 1986, considering its knowledge of general industry safety practices at that time. There was no offer of proof of any kind. Such an offer might have alleged that testimony would prove that Respondent knew of or had tested superior engineering designs and was

"dragging its feet" on their implementation. There was no such allegation here.

There was no dispute over the possibility of installing nets from one end of the building to the other (or all the way around under every floor). The question was the practicality of such a precaution. Similarly, there was no question that the side guardrails could be physically extended to eliminate the gaps in the corners of the outrigger. Company engineers were investigating the impact of such a modification (after the citation) on outrigger stability and wind resistance, at the suggestion of the OSHA inspector. This suggestion, according to the OSHA inspector, was received enthusiastically by Respondent's engineers.

Under such circumstances (absent any offer of proof suggesting that Respondent might be concealing knowledge of viable improvements) evidence relating to subsequent experimentation would be at best cumulative. It would corroborate other evidence that both before and after the citation, Respondent was a leader in establishing safer, practical ways of lifting these materials. A similar conclusion was reached by the Third Circuit Court of Appeals in Knight v. Otis Elevator Co., 596 F.2d 84 (11th Cir. 1979). In that case the courts excluded evidence subsequent to an accident, that guards had been installed around elevator buttons because there was already testimony that such repairs could be made simply easily and inexpensively. The additional

evidence of subsequent repairs would consequently have been cumulative at best and prejudicial at worst.

Many of the carefully-considered decisions relating to this evidentiary issue note that Rule 407 with its exceptions is superceded by Rule 403 which requires exclusion of evidence when its probative value is substantially outweighed by the danger of its unfair prejudice.

This principle applies to this case. Any experimentation after issuance of the citation in response to suggestions of the OSHA enforcement officer (if Respondent was already utilizing state-of-the-art safety procedures) would be totally irrelevant to the question of whether Respondent should be penalized.

Evidence that Respondent experimented with some kinds of improvements, at Complainant's urging after issuance of the citation (or that there may have been technological advancements in the 5 months between the citation and the hearing) should not be held against Respondent. That evidence has no probative value as to the employer's culpability at the time of this inspection. Admission would unfairly prejudice Respondent, who may have engaged in such good-faith efforts to experiment with OSHA suggestions afterwards. The ruling would of course be different if there were any evidence of any kind that Respondent or the industry generally recognized feasibility or utility of such improvements prior to the inspection.

To avoid any need for remand, the evidence on this question has nonetheless been compiled, sealed and segregated from the rest of the record, in case a reviewing authority should deem it admissible.

H.L.K., Jr.

